

Michael B. Mukasey

October 24, 2007

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

Thank you for the graciousness you and the other members of the Senate Judiciary Committee exhibited toward me throughout the hearing. Thank you also for your letter of October 18, which gives me the opportunity to address, again, some of the legal issues raised by foreign intelligence collection and interrogation practices.

As you point out, "torture is prohibited under the Fifth, Eighth, and Fourteenth Amendments, *as well as by law.*" (emphasis added) That coincides with what I said at the hearing, but the *as well as by law* part is important because the other law in this instance is a treaty, the United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment (UNCAT), and legislation enacted to implement it that illuminate constitutional provisions.

When UNCAT was ratified in 1994, Congress complied with its terms by enacting statutes banning torture. Moreover, in consenting to ratification of the treaty, the Senate added the caveat that cruel, inhuman and degrading treatment would be understood in the United States as the treatment forbidden by the Fifth, Eighth and Fourteenth Amendments to the Constitution. Congress further extended the prohibition with the McCain Amendment (enacted as part of the Detainee Treatment Act in 2005), which statutorily bars cruel, inhuman and degrading treatment and reaffirms our treaty commitment. That amendment also extends the protection of those standards beyond the normal reach of the Constitution – as to both nationality and geography – to include aliens in the custody of the United States, wherever held, as does the implementing legislation banning torture.

Therefore, it is accurate to say that torture and cruel, inhuman and degrading treatment are prohibited by the laws of the United States, which of course includes the Constitution. Moreover, this protection, based as it is on a treaty and statutes enacted by Congress and signed by the President, is at the top of the three-tier hierarchy described by Justice Jackson in his famous concurrence in the Steel Seizure case. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). This status is enhanced further by the anti-torture reach of the referenced constitutional amendments.

Warrantless surveillance for the collection of foreign intelligence requires a different analysis. As an initial matter, it is widely accepted that the Constitution does not require that all searches be conducted pursuant to a warrant. The Supreme Court and the lower federal courts have upheld warrantless searches in numerous settings. Searches incident to arrest, border searches, and vehicle searches, to name a few examples, may be conducted without a warrant. Warrantless searches of this sort must still, of course, comply with the Fourth Amendment's reasonableness requirement. The federal courts have treated warrantless searches to obtain foreign intelligence analogously, holding that the Constitution does not require a warrant, although it does require that the searches be reasonable. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); see also *In re Sealed Case*, 310 F.3d 717, 742 (FIS Court of Review 2002).

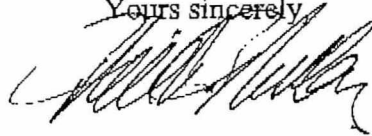
Accordingly, the weight of authority indicates that warrantless surveillance to collect foreign intelligence is not unconstitutional so long as it is otherwise reasonable. This is not to say the government may conduct such surveillance without regard for the privacy interests at stake. Warrantless surveillance directed at US individuals within the United States presents a more complex question, and understandably raises much greater concern, than surveillance directed at foreigners overseas. Indeed, the Foreign Intelligence Surveillance Act ("FISA") and the Protect America Act recognize this distinction and provide a greater role for the Foreign Intelligence Surveillance Court in reviewing and approving surveillance directed at people within the United States than people located abroad.

As I tried to stress during the hearing, government works best, and with the greatest legitimacy, when the branches act cooperatively, each with respect for the other's constitutional prerogatives. I agreed more than once that consultation between the Committee and the Department often can prevent issues from evolving into controversies. FISA appears to be a model of such cooperation and mutual respect. Thus, foreign intelligence gathering is a field in which the executive branch is regulated but not preempted by Congress. This approach has served us well.

As you noted, Congress has amended FISA several times at the request of the executive branch. To the extent FISA may be (or become) inadequate to the task of responding to threats we confront, it is imperative that the branches work together to amend the statute. I am not of the view that the President's constitutional authority to conduct the foreign affairs of the United States and protect our national security is inevitably in tension with Congress's power to legislate in those same areas. To the contrary, if confirmed, I would be a strong advocate for a cooperative approach to Congress in this and other matters of national security. During the hearing, I mentioned the danger of heedlessly carrying a principle off a cliff. There is no reason to provoke a constitutional controversy over a process that works well most of the time, that can be fixed where it does not work, and that involves the security of the American people.

I have no doubt that our country is best served when the political branches work in harmony to fulfill their shared responsibility of securing our Nation's safety from foreign threats. If confirmed, I intend to spend the time that remains for this Administration solving problems cooperatively with Congress rather than exploring our possible differences. I end where I began: I am grateful to you and the Committee for your graciousness.

Yours sincerely

A handwritten signature in black ink, appearing to read "Bill Clinton", written over the typed name "Bill Clinton".